

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DINO CONSTANCE,

Petitioner,

v.

DONALD HOLBROOK,

Defendant.

No. 3:15-cv-05426-RAJ

ORDER

**I. INTRODUCTION**

THIS MATTER comes before the Court on Petitioner Dino Constance's ("Petitioner") motion for relief under Rule 60(b). Dkt. # 115. Having considered all of Petitioner's filings and the record, the Court **DENIES** Petitioner's motion.

**II. PROCEDURAL AND FACTUAL BACKGROUND**

Petitioner is serving a 640-month sentence as a result of a jury trial conviction on multiple counts. Dkt. # 1. On June 24, 2015, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. Dkt. # 1. Petitioner sought relief from his conviction by jury verdict for three counts of solicitation to commit murder in the first degree. Dkt. # 57

1 at 1. In his initial habeas petition, Petitioner raised twelve grounds for relief. Dkt. # 1 at  
2 6-28. The Honorable Karen L. Strombom reviewed all grounds for relief, except one  
3 which Petitioner moved to withdraw. Dkt. # 57 at 1. In a 47-page report and  
4 recommendation (“R&R”), Judge Strombom recommended denying Petitioner’s claims  
5 on the merits and denying the issuance of a certificate of appealability. *Id.* at 46.

6 After Petitioner retained counsel, the parties stipulated to an extension of time to  
7 file objections to the report and recommendation. Dkt. # 59. Petitioner, represented by  
8 counsel, filed preliminary objections, Dkt. # 60, and later moved to continue the date to  
9 file objections and to compel transmission of state court documents, Dkt. # 62. The Court  
10 granted the requests to continue and to compel the state court documents. Dkt. # 68. The  
11 parties later confirmed the receipt and use of such records in a stipulation:

12 [B]ecause the Clark County Superior Court supplied copies of the key exhibits  
13 admitted in the state post-conviction proceedings to counsel for the Petitioner and  
14 counsel for the Respondent . . . [and] counsel for Petitioner has filed these exhibits  
15 and other documents from the state record . . . this Court’s previously issued order  
16 that the Clark County Superior Court Clerk transmit certain exhibits and pleadings  
to this Court, Dkt. N. 68, is no longer necessary.

17 Dkt. #75.

18 On June 21, 2016, Petitioner filed objections to the report and recommendation.  
19 Dkt. # 71. After Respondent filed a response to Petitioner’s objections, Dkt. # 76,  
20 Petitioner filed a supplement to objections with additional case law supporting one of his  
21 arguments, Dkt. # 77.

22 In September 2016, the Court adopted Judge Strombom’s report and  
23 recommendation denying habeas relief, dismissing the petition with prejudice, and  
24 denying the issuance of a certificate of appealability, and judgment was entered. Dkt. ##  
25 78, 79. Petitioner appealed to the Ninth Circuit; his request for a certificate of  
26 appealability was denied on January 30, 2017. Dkt. # 82. Petitioner then filed a petition  
27 for certiorari, Dkt. # 83; his request was denied later that year, Dkt. # 84. Subsequently,

1 Petitioner's counsel's motion to withdraw as counsel was granted on November 16, 2018.  
2 Dkt. # 86.

3 Several months later, Petitioner filed a petition for a writ of mandamus, which was  
4 denied by the Ninth Circuit on August 28, 2019 for failure to demonstrate that the case  
5 "warrants the intervention of [the Ninth Circuit Court of Appeals] by means of the  
6 extraordinary remedy of mandamus." Dkt. # 90. The Court further noted that it would not  
7 entertain any further filings in this "closed case." *Id.* Petitioner again filed a petition for  
8 certiorari, which was denied on March 23, 2020. Dkt. # 92.

9 On August 24, 2020, Petitioner filed a motion to appoint counsel. Dkt. # 93. The  
10 case, initially assigned to the Honorable Ronald B. Leighton, was subsequently  
11 reassigned to the undersigned. Dkt. # 94. On February 16, 2021, the Court denied  
12 Petitioner's motion to appoint counsel. Dkt. # 97. Petitioner then moved the Court for  
13 three extensions to file a motion for reconsideration of the Court's order. Dkt. ## 98, 100,  
14 105. The Court granted each motion. Dkt. ## 99, 102, 106. On May 27, 2021, Petitioner  
15 filed a motion for reconsideration of this Court's order denying Petitioner's motion to  
16 appoint counsel. Dkt. # 108. On August 11, 2021, Petitioner filed a motion to stay  
17 determination of the May 2021 motion for reconsideration until further notice. Dkt. #  
18 110. A few weeks later, on August 31, 2021, Petitioner withdrew the motion to stay. Dkt.  
19 # 111. On January 5, 2022, this Court denied Petitioner's motion for reconsideration. Dkt.  
20 # 113. On February 11, 2022, Petitioner filed the instant motion for relief under Rule  
21 60(b).

### 22 23 III. DISCUSSION

24 Petitioner brings his motion for relief from a judgment pursuant to Federal Rule of  
25 Civil Procedure 60(b). Rule 60(b) "allows a party to seek relief from a final judgment,  
26 and request reopening his case, under a limited set of circumstances." *Jones v. Ryan*, 733  
27 F.3d 825, 833 (9th Cir. 2013) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 528, 125 S.Ct.

2641, 162 L.Ed.2d 480 (2005)). Petitioner seeks relief under Rule 60(b)(6), which permits reopening for “any... reason that justifies relief” other than the more specific reasons set forth in Rule 60(b)(1)-(5). Fed. R. Civ. P. 60(b)(6). A proper Rule 60(b) motion “attacks, not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.” *Gonzalez*, 545 U.S. at 532. A movant seeking Rule 60(b)(6) relief must show “extraordinary circumstances justifying the reopening of a final judgment.” *Id.* at 535 (citing *Ackermann v. United States*, 340 U.S. 193, 199, 95 L.Ed. 207, 71 S.Ct. 209 (1950)). Relief under this subsection is used sparingly, and “rarely occur[s] in the habeas context.” *Id.*

Petitioner argues that the prior habeas proceedings are defective in several ways: (1) the Respondent failed to provide most of the relevant state court record, in violation of *Nasby v. McDaniel*, 853 F.3d 1049 (9th Cir. 2017); (2) the District Court failed to provide *de novo* review of the Magistrate Judge’s report and recommendation and prevented Petitioner from obtaining meaningful appellate review; (3) the Court failed to reach Petitioner’s cumulative *Brady* claim. Dkt. # 115 at 13-30.

**a. Failure to Provide Relevant State Court Record**

Petitioner argues that the prior proceedings have been “fatally flawed and fundamentally unfair,” Dkt. # 115 at 1, because the Court failed to conduct a review of the full, relevant state court record and Petitioner’s objections to the Report and Recommendation. Petitioner claims that the post-conviction record before the Court is “grossly incomplete” and is “lost or suppressed,” *Id.* at 12, leading to a violation of *Nasby*. In *Nasby*, the Ninth Circuit held that a district court must “order the State to submit the relevant portions of the state court record and, after examining them, newly adjudicate [Petitioner’s] petition.” 853 F.3d at 1054. Here, the Court did just that. Petitioner’s former counsel moved the Court to order the state court to provide additional records, Dkt. # 62, and the Court granted the motion, Dkt. # 68. Both parties then confirmed receipt of the necessary portions of the record. Dkt. #75.

1 While Petitioner argues that the Court's order adopting the Report and  
2 Recommendation was entered without access to the full record, Petitioner (through his  
3 counsel) has conceded that the full record was in fact filed with the clerk and reviewed by  
4 the Court prior to the entry of the order and the judgment which dismissed Petitioner's  
5 habeas claims. Dkt. 80 at 54-55. Indeed, Petitioner argued the merits of the findings and  
6 conclusions of the Report and Recommendation based upon the exhibits and documents  
7 obtained from the state court in his objections. *See, e.g.*, Dkt. # 71 at 3 n.5; *id.* at 8 n.14. It  
8 is clear that all parties and the Court had access to the state court record before the Court  
9 issued its order adopting the Report and Recommendation.

10 **b. *De Novo* Review of the Report and Recommendation**

11 Petitioner asserts that the Court failed to review the relevant state court record  
12 (that it ordered be produced) and that the Court's order adopting the Report and  
13 Recommendation did not reach the *de novo* standard of review, thereby depriving him of  
14 a basis for appellate review. Dkt. # 115 at 18-21. Besides Petitioner's assumption that it  
15 was "completely impossible" for the Court to review the records produced and his vague  
16 contention that the Court only approved the Report and Recommendation out of  
17 "frustration," *id.* at 14, Petitioner points to nothing in the record to suggest that the Court  
18 did not have access to the relevant record at the time it issued its order and that it did not  
19 conduct a full review of Judge Strombom's well-reasoned and well-supported decision.

20 Additionally, the Court of Appeals was not denied an opportunity to conduct a full  
21 appellate review, as the district court's denial for a writ of habeas corpus is reviewed *de*  
22 *novo*. *Varghese v. Uribe*, 720F.3d 1100, 1105 (9th Cir. 2013). Findings of fact made by  
23 the district court are reviewed for clear error, *Mendoza v. Carey*, 449 F.3d 1065, 1068,  
24 and the Court of Appeals may affirm on any ground supported by the record. *Varghese*,  
25 720 F.3d at 1105. Here, this record would include not just this Court's order adopting the  
26 Report and Recommendation, but also the Report and Recommendation itself. There is  
27 nothing in the record to suggest that the Court's September 1, 2016 Order in any way

precluded appellate review.

**c. Cumulative *Brady* Claim**

Lastly, Petitioner asserts that the Court failed to adjudicate Petitioner’s “cumulative *Brady*” claim that was raised in his habeas petition and in the objections to the report and recommendation. Dkt. # 115 at 23-24. However, Judge Strombom’s Report and Recommendation did in fact address Petitioner’s multiple *Brady* claims, Dkt. # 57 at 15-25, and his cumulative error claim, *Id.* at 45-46. In both instances, the Court rejected those claims and found that the decision of the Washington Court of Appeals was not contrary to or an unreasonable application of clearly established federal law. *Id.* at 25, 45-46. Specifically addressing Petitioner’s cumulative error argument, the Court found that the alleged errors were insufficient to require habeas relief and did not become meritorious by aggregating the alleged errors into one claim. *Id.* at 45; *see also Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987).

Although Petitioner states that he “is not re-raising a previously litigated issue,” Dkt. # 115 at 24, this assertion is a re-tread of arguments already raised in his objections to the Report and Recommendation, Dkt. # 71, and in Petitioner’s Motion for a Certificate of Appealability, Dkt. # 80. However, even if Judge Strombom had not addressed Petitioner’s “cumulative *Brady*” claim in the report and recommendation, Petitioner would not necessarily be entitled to Rule 60(b) relief. “While a claim not adjudicated on the merits is not considered a successive [habeas] petition, that does not automatically mean [Petitioner] has met his burden for the Court to grant his 60(b)(6) motion and reopen his case.” *McGary v. Richards*, No. C09-5156 BHS, 2013 WL 1010746, at \*4 (W.D. Wash. Mar. 14, 2013). The Court finds that the type of extraordinary circumstances warranting relief under Rule 60(b)(6) are not present here. At the time of its order, the Court reviewed Judge Strombom’s Report and Recommendation and the relevant record, including the multiple state court documents that were produced by the Clark County Superior Court Clerk and Petitioner’s objections,

1 Dkt. ## 71, 77, and determined that Judge Strombom's reasoning was sound. Dkt. ## 78,  
2 79. The arguments advanced by Petitioner primarily restate the many arguments raised in  
3 his habeas petition and in his objections, and do not demonstrate any error in the Court's  
4 judgment. Petitioner "supplies no reasoning that demonstrates a defect in the integrity of  
5 the habeas proceedings, any error in the Court's habeas ruling showing that dismissal of  
6 his claims was improper... or that extraordinary circumstances warrant relief." *McGary*,  
7 2013 WL 1010746, at \* 4 (citing *Gonzalez*, 545 U.S. at 532).

#### 8 IV. CONCLUSION

9 For the reasons stated above, Petitioner's motion for relief under Rule 60(b) is  
10 **DENIED.**

11  
12 DATED this 30th day of September, 2022.

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16 The Honorable Richard A. Jones  
17 United States District Judge  
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